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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 933

JAMES ALVADO, et al.,
Petitioners

v.

GENERAL MOTORS CORP.,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1955

No.

JAMES ALVADO, et al.,

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v.

GENERAL MOTORS CORP.,

Respondent

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

James Alvado and Francis M. Bilbee, in behalf of themselves and the other members of the class they represent, pray that a writ of certiorari issue to review a judgment of the Court of Appeals for the Second Circuit entered in the above entitled case on February 9, 1956. Their petition is submitted in typewritten form in accordance with Rule 54(1), Revised Rules of this Court.

Opinions Below

The opinion of the District Court granting defendant's motion for summary judgment (R. 24a) is not reported. The opinion of the Court of Appeals reversing the judgment of the District Court (R. 57b) is reported at 229 F.2d 406.

Jurisdiction

The original opinion of the Court of Appeals was issued December 22, 1955 (R. 34b) and judgment in accordance therewith was entered on that date. (R. 43b) A petition for rehearing was filed by defendant January 16, 1956 (R. 44b), and a revised opinion was issued February 8, 1956. (R. 57b) The petition for rehearing was granted and the former judgment vacated February 9, 1956. (R. 65b, 43b) Judgment in accordance with the revised opinion was dated and entered February 9, 1956. (R 70b) Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the "escalator" principle of the statute repeatedly followed by this Court, requiring the veteran to be restored to the terms and conditions of his employment which he would have enjoyed had he remained continuously employed instead of being absent in military service, is inapplicable to vacation pay and permits returning veterans to be denied vacation pay comparable to that received by non-veterans with similar employment history.

2. Whether, if the escalator principle does not apply to vacation pay, the "other benefits" clause of the Act is also inapplicable to vacation pay provisions annually negotiated, so as to leave such provisions entirely without the Act.

Statute Involved

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. App. 308, are set forth in the Appendix.

Statement

This action is the fourth effort of the veterans, some 50,000 in number,[1/] to obtain redress under Section 8(e) of the Act, 50 U.S.C. App. 308(e), for defendant's denial, in the year (July 1945-June 1946) they returned to defendant's employ from military service, of the vacation pay to which the Act entitled them. The total amount involved, including interest, is approximately $5,600,000. Twice previously, in cases which did not present so plainly the errors involved here, the veterans have asked this Court to

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1/ The figure is defendant's own. Though it refused to admit the accuracy of this figure in the complaint here (R. 3a, 11a), defendant admitted it in one of the earlier suits, Neal v. General Motors, Civil No. 6053, E.D.Mich., 1946. (UAW motion to intervene as petitioner, par. 3; answer to petition, par. 3).

Defendant suggested below that this action was ill-founded because no other members of the class have intervened. The material facts are identical with respect to every member of the class, and one will represent it as well as one thousand; but if the court considers it necessary, additional plaintiffs will be named immediately.

review decisions adverse to them.[2] Since then, this Court has reaffirmed its view of the statute which the veterans urge here; in addition, there is a conflict between courts of appeals.

The material facts are stated in the opinion below as follows (R. 57b - 60b):

> Plaintiff sues under § 8 of the Selective Training & Service Act of 1940, 50 U.S.C. Appendix Section 308 (hereinafter referred to as the Act), on behalf of himself and other veterans similarly situated* to recover vacation pay for the fiscal year ending in June 1946, which allegedly was denied them by a discriminatory collective bargaining agreement entered into by defendant and plaintiff's union, United Auto Workers, CIO, on March 19, 1946. Plaintiff has been in the employ of defendant since 1933. He entered military service in February 1944, and, after being honorably discharged, was reinstated as an employee on October 30, 1945.
>
> Beginning in 1940, a clause providing for vacation pay has been adopted annually in an agreement between the United Auto Workers Union and defendant, through collective bargaining between defendant and the Union. Until the 1946 agreement, and for each year since, the annual collective bargaining agreement provided for vacation pay for all hourly-rated employees who were employed for any period of time at the end of the vacation year, July 1 to June 30 or, in 1943 and thereafter, a single day in the last weekly pay period at the end of the vacation year. The amount of vacation pay was determined by seniority; those with one-year seniority were entitled to forty hours' pay, and those with five or more years seniority received eighty hours' pay. During the war years of 1943, 1944, and 1945, when the work week was increased from five to six days, the vacation pay was raised to forty-eight and ninety-six hours' pay.
>
> On November 21, 1945, the union called a strike which lasted until March 13, 1946. Because of the strike, defendant proposed, in negotiations with the union, that the amount of vacation pay be based on a percentage of earnings for the fiscal year ending in June 1946, rather than on the forty or eighty hours' pay basis used up to that time, in order to reduce vacation pay proportionately to the time

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2/ In Dougherty v. General Motors Corp., 176 F.2d 561 (C.A. 3), certiorari denied 338 U.S. 956, it appeared -- what is now known not to be the fact (R. 16b - 17b) -- that the provision here in question was intended to and did impose a requirement of actual work in 1945 in order to be eligible for vacation pay; in fact it was meant, as defendant asserts, only to reduce vacation pay proportionately to the time defendant's plants were closed by the strike. In Foster v. General Motors Corp., 191 F.2d 907 (C.A. 7), certiorari denied 343 U.S. 906, rehearing denied 343 U.S. 937, the decision was rested on the ground, since established as erroneous in Diehl v. Lehigh Valley R.R.Co., 348 U.S. 960, that the statute is satisfied if the veteran is treated no worse than those on non-military leaves of absences.

* (Footnote in original) The class of veterans to which the plaintiff belongs, and in whose behalf this action is brought, is that of the employees of defendant whose vacation pay is governed by the 1946 collective bargaining agreement, who entered military service, who had one or more years' seniority at the end of the fiscal year ending June 1946, so as to qualify for vacation pay under all prior agreements, who were entitled to reinstatement under the Act, and who were employed in the last pay period in the fiscal year ending in June 1946.

lost in the strike.[3] The union objected because this would place the entire burden of the strike on the employees; it proposed that the percentages be applied to earnings during the calendar year 1945. This would be more favorable to the strikers, since the bulk of the strike had taken place in 1946. Defendant agreed, and the new contract provided, that the amount of vacation pay was to be fixed at 2%, 3% or 4½% of the employees' total gross earnings for the calendar year 1945, for those with more than one, three, or five years seniority, respectively. Eligibility was still determined by whether an employee worked in the last weekly pay period at the end of June 1946.

The plan ultimately adopted effectively deprived returning veterans of most, if not all, of their vacation pay for 1946, since most of them returned to work in the latter part of 1945; with the strike on from November 21, 1945, they had little earnings in the calendar year 1945. The result would have been the same, though not to such a great degree, if the defendant's plan to take a percentage of the earnings in the fiscal year 1946 had been adopted.

Plaintiff alleged that the agreement deprived veterans in the class, on whose behalf this suit is brought, of rights expressly granted to them under § 8(c) of the Act. Plaintiff, in particular, alleged that, at the time of the negotiations which resulted in the 1946 agreement, defendant knew and intended that the agreement would have the effect of depriving veterans of almost all vacation pay in the year in which they returned (i.e., calendar year 1945 and fiscal year 1946).

Defendant, in its answer, denied that the purpose or effect of the agreement was to discriminate against veterans with respect to vacation pay. Both plaintiff and defendant moved for summary judgment. (Emphases added.)

The District Court granted defendant's motion for summary judgment. The Court of Appeals reversed, holding plaintiffs entitled to a trial on the factual question whether the 1946 change in the vacation provision was discriminatory against returning veterans (R. 61b - 64b); plaintiffs consider

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3/ (footnote not in original): There is nothing illegal about this objective, and under the escalator principle, the veterans are subject to having their vacation pay reduced on this account to the same extent as non-veterans, i.e. reduced about 11%, the proportion of work time eliminated from calendar 1945 by the strike. Also, for purposes of the escalator and other benefits questions, plaintiffs must concede that this was the intent, purpose and meaning of the "percentage of 1945 earnings" basis for computing vacation pay, and they argue that even so, they are entitled to equality with non-veterans. However, if this were the only purpose of the "percentage of earnings" requirement, it is difficult to understand defendant's insistence on reducing veterans' vacation pay to the vanishing point instead of to the 89% which prevailed for non-veterans. In fact, of course, plaintiffs believe that by this requirement defendant intended to and did discriminate against them, and propose to prove it at the trial.

this conclusion correct, and it is not at issue in this petition. However, the Court of Appeals agreed with the District Court in denying plaintiffs' motion for summary judgment. It held the escalator principle inapplicable to vacation pay, and the "other benefits" clause of the Act inapplicable to vacation pay provisions negotiated annually.[4/] The court's decision on these points is as follows (R. 60b - 61b):

> Vacation pay does not come within those provisions of 50 U.S.C. § 308(c), ensuring restoration of a veteran's rights without loss of seniority, but within the provision that a veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough

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4/ Review of the "continuous employment" and "other benefits" questions, if otherwise appropriate, is not foreclosed merely because the judgment below does not represent a final disposition of the separate issue of discrimination; for the decision below is a final disposition of the first two questions. Nothing which occurs at the trial of the discrimination question can affect that disposition. The evidence there adduced will relate to the disproportionately adverse effects and operation against veterans of the "percent of 1945 earnings" provision, and defendant's knowledge of this - matters in no way related to application of the escalator principle or the "other benefits" clause. Thus, "after the entry of judgment on" the escalator and other benefits questions, "the claim based on" those issues "was terminated and could not be affected by any action which the Court might take respecting the remaining claims [of discrimination]. Nothing remained to be done except appeal." Reeves v. Beardall, 316 U.S. 283, 286. Moreover, the disposition of those two issues, being wholly independent of the discrimination question, is not a matter which may "become quite unimportant by reason of the final result" of the trial. American Const. Co. v. Jacksonville Ry., 148 U.S. 372, 384.

If plaintiffs are entitled to judgment on the continuous employment and other benefits questions, the long, expensive and arduous trial on the discrimination point will be unnecessary. Issuance of the writ is therefore appropriate "to prevent extraordinary inconvenience and embarrassment in the conduct of the case." American Const. Co. v. Jacksonville Railway, 148 U.S. 372, 384. If review be granted now on these two issues, their disposition will be final, and there is no possibility that it "would allow an appeal or writ of error upon the same question to be 'repeated, to the great oppression of the parties.'" Id., at 379. The burden on this Court will be no greater than if the questions are presented after final judgment on the separate issue of discrimination. Moreover, Rule 54(b), F.R.C.P., in providing for judgment on "less than all of the claims" in an action where "more than one claim for relief is presented," contemplates finality and the corresponding reviewability as to these claims, even though the judgment did not terminate all the questions in the case. Reeves v. Beardall, 316 U.S. 283, 285. Indeed, it may be that plaintiffs cannot petition for review of the escalator and other benefits questions after trial of the discrimination question. See FTC v. Minneapolis-Honeywell Co., 344 U.S. 206.

In addition, the conflict between Mentzel and the decision below makes review appropriate even though the judgment is not final in all respects. United States v. General Motors Corp., 323 U.S. 73; Hanover Star Milling Co. v. Metcalf, 240 U.S. 403. See also Forsyth v. Hammond, 166 U.S. 506.

or leave of absence in effect with the employer at the time such person was inducted" into the Armed Forces. See Siaskiewicz v. General Electric Company, 166 F.(2d) 463, 465-466 (C.A. 2); Dwyer v. Crosby Company, 167 F. (2d) 567 (C.A. 2). Consequently, Oakley v. Louisville & N. R. Co., 338 U.S. 278, Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, and Diehl v. Lehigh Valley R. Co., 348 U.S. 960, are inapposite, since they dealt solely with the seniority provisions of § 308(c) and not at all with the "other benefits" provision of that clause. Since vacation pay was subject to annual negotiation and agreement, the court below properly denied the plaintiff's motion for summary judgment since he was not entitled, as a matter of law, to "other benefits" calculated under the 1940 agreement.

Reasons for Granting the Writ

I. The departure below from the well-established escalator principle of this Court's decisions adversely affects the rights of tens of thousands of veterans and requires correction through this Court's supervisory powers.

The court below expressly refused to apply the "escalator" principle of this Court's Fishgold, Oakley and Diehl decisions (supra, this page), which requires the returning veteran to be restored to the position he would have enjoyed had he remained "continuously employed." That principle, it held, does not extend to vacation pay. This Court's repeated application of the escalator principle has had the express approval of Congress, and in Oakley and Diehl was held to embrace all the "terms and conditions" of the veteran's employment. The flagrant departure below from that well-established principle demands correction through this Court's supervisory powers.

In every veteran's reemployment case which has come here, the escalator or continuous employment principle has been the ratio decidendi. Beginning with Fishgold, the right of the veteran to his position on the escalator of his employment which he would have occupied had he remained continuously employed was held to preclude a reinstated veteran from being preferred in layoffs over non-veterans with greater seniority, because he would not have achieved such position had he remained continuously employed. In Trailmobile Co. v. Whirls, 331 U.S. 40, a veteran was held not exempt from a provision placing him, along with all other employees of a merged company, at the bottom of a combined seniority roster, because his absence in military service in no way contributed to this result. Similarly, in Aeronautical Lodge v. Campbell, 337 U.S. 521, the principle was held to deny

an exemption of veterans from a collective bargaining agreement placing shop stewards at the top of the seniority roster. In Huffman v. Ford Motor Co., 345 U.S. 330, the principle was held to permit an employer and union to give newly-hired employees seniority credit for time in military service and thereby to place them in more advantageous positions than some reinstated veterans. In Oakley, veterans who, had they not been absent in military service, would have been promoted to a better job or allowed to transfer to a more secure one were held entitled to such jobs on return, with seniority computed as if they had made the change when the opportunity occurred during military absence (i.e. seniority greater than previously junior non-veterans who made the change while the veterans were absent), since that is the position they would have reached had they remained "continuously employed." And last term, in Diehl, the Court held a veteran, who before military service had partially completed a four-year work requirement for promotion and finished it after his return, entitled to the seniority he would have achieved had he remained continuously employed, which gave him greater seniority than several non-veterans previously junior to him who had completed the four years in his absence.

In each of these cases, the returning veteran was explicitly held to be entitled to no more, and to no less, than he would have enjoyed had military service not interrupted his employment. This principle does not mean, of course, the writing of a new contract governing the terms and conditions of employment. Rather, it means that, whatever the employer and union through collective bargaining determine to be the framework of such terms and conditions, the Act then cuts across the collective agreement to assure the returning veteran his position within that framework which he would have occupied had he remained continuously employed.

This interpretation of the statute is not based on any single clause in it, construed in isolation from the rest, but derives from a reading of the statute as a whole -- the general and basic guaranty in Section 8(b) of the veteran's former "position," including his "seniority, status and pay," as well as the several detailed guaranties of 8(c). So

this Court held in Fishgold, saying "Our problem is to construe the separate provisions of the Act as an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." This canon led to the immediate concrete conclusion that "these provisions [both 8(b) and 8(c)] guarantee the veteran — [that] his service in the armed services is counted as service in the plant, so that he does not lose ground by reason of his absence." 328 U.S. at 285.

It has been the failure of the Courts of Appeals to follow this construction, their refusal to consider the statute as an "organic whole" and their inclination to "tear clauses from their context" (Trailmobile Co. v. Whirls, 331 U.S. at 55) which has led to every prior reversal here and which warrants review in the present case. Thus, in Whirls and Campbell, the Sixth and Ninth Circuits were reversed because they attempted to use the clause in 8(c), forbidding a veteran's discharge without cause within one year after reemployment, as a means of giving the veteran more than the continuous employment standard. In Oakley, the Sixth Circuit was reversed because, in disregard of the escalator principle, it singled out the "shall not be discharged without cause within one year" clause as representing the maximum time the statutory protection endured in all other respects. And most recently, in Diehl, the Third Circuit was reversed because it regarded the clause "shall be considered as having been on furlough or leave of absence" as overriding the continuous employment standard, and held the statute satisfied so long as the veterans were treated no worse than a non-veteran on leave for the same period.

The error in the present case is the same misplaced emphasis on one of the subordinate clauses of 8(c) as limiting the entire statutory protection. Here the clause which is used to deny the veterans what they would have received if continuously employed (that is, vacation pay non-veterans with comparable seniority received, with the same reduction for the strike period)

is not the first, as in Diehl above, but the second leave of absence clause.[5] That clause provides that the veteran must receive

> insurance and other benefits - - - pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted - - -.

The court below justified its rejection of the escalator principle on the ground the veterans were entitled to vacation pay only to the extent that established rules for those on non-military leave would give them vacation pay (and then the court rendered this clause of the Act meaningless, holding that there were no "established" rules here).[6] Thus, the employer is left

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5/ The first "leave of absence" clause of the Act states that the veteran "shall be considered as having been on furlough or leave of absence" during his military service. The second clause in which "leave of absence" appears is quoted in the text, and is sometimes called the "other benefits" clause.

6/ Under the rule in effect in the respective years the veterans entered military service from 1940 through 1945, a person on non-military leave for the same portion of the vacation year as the veterans were absent in 1946 would have received full vacation pay, one or two weeks pay according to his seniority. The statute requires that the rule for that earlier year be used to compute the veteran's vacation pay in 1946, the year of his return.

The court below avoided this result by holding that vacation pay rules were not established within the meaning of the "other benefits" clause if they were "subject to annual negotiation." (R. 61b) Now the vacation pay rules of defendant, though established separately for each year, were abundantly clear, precise and definite, were publicly in effect and observed by defendant for the entire year each veteran respectively was inducted, and were conclusive for the years they governed. All these elements establishing the rule were disregarded below in favor of the view that to be "established," the rule must be established for some indeterminate period longer than a year.

This interpretation has several flaws: (1) it disregards the statutory command that the rule need be established and in effect only "at the time" the veteran is inducted; (2) it violates the common sense view and judicial understanding of "established": Ickes v. United States, 270 U.S. 245, 248, 250; Wells Lamont Corp. v. Rodier, 149 F.2d 364, 366-7 (Em. App.); Alexander Theatre Ticket Office v. United States, 23 F.2d 44, 48 (C.A. 2); (3) it permits employers to place all "other benefits" permanently beyond the reach of the statute by the simple and customary method of providing for them in annual agreements; and (4) it renders the "other benefits" clause wholly meaningless; for if contractual provisions giving vacation pay to those on leave are in effect (as the decision below seems to require) in both the year of departure and year of return, then those provisions by their terms would protect the veteran; or if they do not, any attempt to exclude him from their protection would violate the first "leave of absence" clause of the Act; in either case, the "other benefits" clause becomes nugatory.

However, though the view the court below took of the "other benefits" clause seems plainly erroneous, plaintiffs do not urge this as an independent reason for review here. They remain convinced that the escalator principle represents the correct rule in their case; that principle renders viable all the clauses in the Act, and entitlement to "other benefits" would then mean "other benefits, as modified in nondiscriminatory fashion," in this respect the same as any other terms and conditions of the "position" the veteran left.

Of course, if the escalator principle is inapplicable in this case, review of the erroneous interpretation of the "other benefits" clause becomes as necessary and important as review of principal issue discussed in the text, and plaintiffs will argue both questions if the writ is granted.

free -- as in the Diehl situation before this Court blocked that avenue of escape from the escalator principle -- to exclude the veterans from a "benefit" by manipulating the rules for those on non-military leave, a group whose absences are neither so numerous nor so long as the veterans' military service. This logic of restriction could be extended equally to every other individual clause of 8(c).[1] It is appropriate for this Court to scotch it here.

Results in the present case make this almost painfully clear. The interpretation below leaves the veterans without protection against the heads-I-win-tails-you-lose type of change which defendant made in its vacation pay rules. Under the provision in effect for the various years the veterans entered military service, they lost vacation pay because they were unable to work a day at the end of the vacation year; and in the year most of them returned (July 1945 - June 1946) they were able to work the day at the end of the year but lost it because they had no earnings in calendar 1945. In concrete figures, the two plaintiffs named here as typical of their class have, during their years of departure and return, worked a total of almost two years, for which they have received a total of $7.50 vacation pay between them. (R. 26b, 31b) The average non-veteran with the same seniority whose employment was not interrupted for military service received, with reduction for the strike period, vacation pay of about $88 in 1946.

Recognizing that the continuous employment principle of Fishgold, Oakley and Diehl seemed to govern this case, the court below refused to follow those decisions on the ground they "dealt only with the seniority provisions of Section 8(c) and not at all with the 'other benefits' provision of that clause." (R. 60b). The distinction is without substance. "Seniority" in general refers to an employee's length of service with the employer, or

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[1] As an example, perhaps extreme, of the fallacies inherent in any such piecemeal construction of this statute, Bostian v. Seaboard Airline R. Co., 211 F.2d 867 (C.A. 4) refused to follow the escalator rule, on the ground the veteran was, under the basic guaranty of "former position," "seniority, status and pay" in 8(b), entitled only to the job or "position" he had left. This interpretation ignores the fact that the "position" the veteran leaves includes any rights to advancement inherent in it, and of course would defeat the escalator principle entirely. Since Bostian was in all essentials similar to Diehl, it is no longer authority.

in a particular job, and of itself has no meaning or significance apart from the advantages it may confer. Seniority may establish preference in layoff and rehire, give a right to promotion or transfer, cause a raise in the employee's pay, determine the amount of his vacation pay (as it did in this case, for each year except the one in dispute), entitle him to certain privileges such as extended leave, or may affect any other of the terms and conditions of his employment. Collective Bargaining Provisions, U. S. Bureau of Labor Statistics Bull. No. 908, Part 2, p. 3 (vacation pay); Part 5, p. 11, 25 (discharges); Part 6, p. 4, 7, 11, 13 (leaves of absence); Part 7, p. 8, 11, 14, 17 et seq. (promotions and transfers) (1947 - 1948); Union Agreement Provisions, U. S. Bureau of Labor Statistics Bull. No. 686, 117, 125-137 (1942); see also the authorities collected in Aeronautical Industrial Lodge v. Campbell, 337 U.S. at 528, n. 5. As this Court observed in Campbell:

> There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. (Emphasis added.) 337 U.S. at 526.

The hollowness of refusing to apply the continuous employment standard because it deals with "seniority" is nowhere more apparent than in the present case, for insofar as material, vacation pay here was an incident of seniority. Seniority was the factor determining both eligibility for and the amount of vacation pay (given a day's work at the end of the year, which the veterans have performed) in every year except the one in dispute; and in that year seniority determined the groups qualified to receive vacation pay, and by defendant's own admission (R. 16b - 18b) was intended to determine the amount except for the reduction on account of the strike period - a reduction to which the veterans concede they are subject. Indeed, it would seem that this Court recognizes no such limitation of the escalator principle to "seniority" - whatever that term may include in a given case - because it held in Oakley that the "moving escalator" embraced the "terms and conditions affecting that particular employment." 338 U.S. at 283.

Moreover, the legislative history of the "other benefits" clause shows conclusively that it was not intended to remove the other benefits from the protection of the escalator rule, but was intended to supplement and be

consistent with that rule. For in the evolution of the statute this clause, like the first "leave of absence" clause, did not appear until the final stage, and then was added in an effort to increase the veteran's protection. In earlier stages, "other benefits" were mentioned generally along with seniority and other incidents of the employment[8] to which the veteran was to be restored in accordance with the escalator principle.[9] An amendment from the Senate floor cast the provisions in their present form, adding both the first "leave of absence" clause (which Diehl held not to impair the escalator principle) and the second "leave of absence" or "other benefits" clause. This change was plainly not meant to detract from, but to add to, the escalator principle; for as the Chairman of the House Military Affairs Committee stated, it would "make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life." (Emphasis added.) 86 Cong. Rec. 10914. The author of the amendment concurred in this view and stated that the Senate Committee's professional staff considered it an improvement in language. Ibid.[10]

If further confirmation be needed, it is found in the express Congressional approval of this construction of the Act (following Fishgold and Whirls) by writing into it the "continuously employed" standard in those words, identical to the Court's language.[11] This addition to the statute was considered by Congress to be a "statement of policy regarding application of the 'escalator principle'" and to grant "no additional reemployment right - - - over reemployment rights now enjoyed - - - under the 1940 Act."[12] To say, as did the court below, that "other benefits" are without the escalator principle is to ignore the plainly expressed will of Congress.

8/ Selective Service bill, as reported to both Houses, 86 Cong. Rec. 10922-3; companion National Guard Act, Joint Res., August 27, 1940, c. 689, 54 Stat. 858.

9/ 86 Cong. Rec. 10761.

10/ The National Guard Act was amended to conform to this change. Section 8(d), Selective Training and Service Act, 54 Stat. 891.

11/ Selective Service Act of 1948 (now the Universal Military Training and Service Act), Section 9(c)(2), 62 Stat. 615, 50 U.S.C. App. 459(c)(2), reproduced in the Appendix.

12/ S. Rept. No. 1268, 80th Cong., 2d Sess., p. 15, 16.

Whether vacation pay should be thus removed from the protection of the escalator rule, and indeed from the ambit of the statute itself, is a question of continuing and widespread effect, and also of considerable public import. This statute was enacted in pursuance of Congress' power to declare war and raise and support armies. Willingness to assume the obligation to render military service is affected if the citizen is aware he will be placed at a disadvantage in his employment by reason of such service. The statute in effect at present[13] is identical in all material respects to the one here involved, and vacation pay provisions are a widely prevalent feature of employment, affecting the vast majority of all employed persons.[14] The issue will therefore constantly face a great proportion of those returning from the armed forces. With a military establishment of 2,500,000 men, the lowest figure Mr. Stassen has suggested as a disarmament goal,[15] the number returning to civilian life from military service would, under present terms of service, exceed 700,000 annually,[16] a great majority of whom will have reemployment rights. The 50,000 veterans involved in the present case is in itself a not inconsiderable segment of those who served in the last war. Resolution of the issue by this Court is therefore appropriate because of its continuing importance, as well as because of the recalcitrance shown by the court below in the face of authoritative decisions of this Court.

II. The decision below conflicts with a decision of another Court of Appeals.

The decision below should be reviewed because it conflicts with Mentael v. Diamond, 167 F.2d 299 (C.A. 3). In that case, under a collective

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13/ 62 Stat. 615, 50 U.S.C. App. 459(c)(1) and (2).

14/ 86% of all employees in private industry, or a total (in 1943 - 1944) of 32.4 million workers enjoyed vacation pay rights. Paid Vacations in American Industry, U. S. Bureau of Labor Statistics Bull. No. 811, p. 1-2 (1945).

15/ New York Times, March 23, 1956.

16/ "Manpower Resources for National Security," a report to the President by the Director of the Office of Defense Mobilization, January 6, 1954, contains the most recent unclassified data, and shows an annual turnover of 760,000 at a total strength of 2,800,000. (See p. 2, 5) The decrease to a strength of 2,500,000 would decrease the turnover less than proportionately, because such decrease would not involve many of those enlisting for long terms or reenlisting.

bargaining agreement giving one week vacation pay to those with "one year service" and two weeks to those with "five years service," the continuous employment principle was held to entitle a veteran to count his military service as part of the "five years service" and to receive two weeks vacation pay. As the court there said, in words paralleling Fishgold:

> The veteran is to be treated, so far as benefits under the Act are concerned, as though he had worked every day at the plant. He steps back on the escalator, when discharged from military service, at the point where he would have been had he never donned the uniform. That being so, he is entitled to whatever vacation rights would have accrued to him had he not shouldered a gun and gone off to war. In this case, under the contract, it would have been two weeks for 1946. He was paid for one, he is entitled to be paid for the other. (167 F.2d at 301)

Yet in the present case the Fishgold, Oakley and Diehl decisions of this Court are rejected for the specifically stated reason that they are "inapposite, since they dealt solely with the seniority provisions of 8(c) and not at all with the 'other benefits' provision of that clause." (R. 60b) In each case the veteran had met all other requirements for eligibility for vacation pay, and the only question was how much of it he should receive -- whether his military service should be included in the basis for computing vacation pay, so as to give him a greater amount. Yet in Mentzel, military service was counted to increase his vacation pay, and here it was not.

That vacation pay here was computed as a percentage of prior earnings does not serve to distinguish the cases, and the court below properly regarded this circumstance as immaterial to application of the escalator principle. For defendant asserts, as the court below observed, that this provision was adopted at its urging, not to make vacation pay dependent on the performance of work, but in order to reduce the vacation pay of all employees proportionately to the time the plants were closed by the strike. (R. 59b) This fact had not been drawn from defendant in an earlier phase of this litigation, Dougherty v. General Motors Corp., 176 F.2d 561 (C.A. 3), and the court there considered that the vacation pay was based on "work already performed" (176 F.2d at 563 - 564); that decision therefore does not modify the reasoning or result in Mentzel, and in

no way mediates the conflict between Mentzel and the present case. Plaintiffs concede that, where work is required in order to be eligible for vacation pay, e.g. "employees must work 50% of scheduled hours for one week vacation pay and 75% of scheduled hours for two weeks vacation pay," military service does not count toward meeting such a requirement,[17] but that was not the case in Mentzel, nor here.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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17/ Just as Diehl was not entitled to resume his place on the escalator until he had completed the 1160 days of actual work which were required for advancement.

Statute Involved

The pertinent provisions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. App. 308, are as follows:

* * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year--

* * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.

The Selective Service Act of 1948 (renamed the Universal Military Training and Service Act in 1951) is identical to the above statute except for additions not material here. The subsection enacting the "continuous employment" standard is Section 9(c)(2), 62 Stat. 615, 50 U.S.C. App. 459(c)(2), and is as follows:

(2) It is hereby declared to be the sense of Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(Opinion Below)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 4--October Term, 1955.

(Argued October 11, 1955 Decided December 22, 1955

Opinion revised February 8, 1956.)

Docket No. 23190

JAMES ALVADO,
Plaintiff-Appellant,

- v. -

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

Before:

FRANK, HINCKS and WATERMAN,
Circuit Judges.

Appeal from a summary judgment of the United States District Court for the Southern District of New York, entered by Judge Ryan. REVERSED.

JACOB SCHNEIDER and SIDNEY HERMAN, for appellant.

GEORGE A. BROOKS (Edward B. Wallace and Edward W. Horne, of counsel), for appellee.

Plaintiff sues under § 8 of the Selective Training & Service Act of 1940, 50 U.S.C. Appendix Section 308 (hereinafter referred to as the Act), on behalf of himself and other

(Opinion Below)

veterans similarly situated [1] to recover vacation pay for the fiscal year ending in June 1946, which allegedly was denied them by a discriminatory collective bargaining agreement entered into by defendant and plaintiff's union, United Auto Workers, CIO, on March 19, 1946. Plaintiff has been in the employ of defendant since 1933. He entered military service in February 1944, and, after being honorably discharged, was reinstated as an employee on October 30, 1945.

Beginning in 1940, a clause providing for vacation pay has been adopted annually in an agreement between the United Auto Workers Union and defendant, through collective bargaining between defendant and the Union. Until the 1946 agreement, and for each year since, the annual collective bargaining agreement provided for vacation pay for all hourly-rated employees who were employed for any period of time at the end of the vacation year, July 1 to June 30 or, in 1943 and thereafter, a single day in the last weekly pay period at the end of the vacation year. The amount of vacation pay was determined by seniority; those with one-year seniority were entitled to forty hours' pay, and those with five or more years seniority received eighty hours' pay. During the war years of 1943, 1944, and 1945, when the work week was increased from five to six days, the vacation pay was raised to forty-eight and ninety-six hours' pay.

On November 21, 1945, the union called a strike which lasted until March 13, 1946. Because of the strike, defendant proposed, in negotiations with the union, that the amount of vacation pay be based on a percentage of earn-

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1 The class of veterans to which the plaintiff belongs, and in whose behalf this action is brought, is that of the employees of defendant whose vacation pay is governed by the 1946 collective bargaining agreement, who entered military service, who had one or more years' seniority at the end of the fiscal year ending June 1946, so as to qualify for vacation pay under all prior agreements, who were entitled to reinstatement under the Act, and who were employed in the last pay period in the fiscal year ending in June 1946.

ings for the fiscal year ending in June 1946, rather than on the forty or eighty hours' pay basis used up to that time, in order to reduce vacation pay proportionately to the time lost in the strike. The union objected because this would place the entire burden of the strike on the employees; it proposed that the percentages be applied to earnings during the calendar year 1945. This would be more favorable to the strikers, since the bulk of the strike had taken place in 1946. Defendant agreed, and the new contract provided, that the amount of vacation pay was to be fixed at 2%, 3% or 4½% of the employees' total gross earnings for the calendar year 1945, for those with more than one, three, or five years seniority, respectively. Eligibility was still determined by whether an employee worked in the last weekly pay period at the end of June 1946.

The plan ultimately adopted effectively deprived returning veterans of most, if not all, of their vacation pay for 1946, since most of them returned to work in the latter part of 1945; with the strike on from November 21, 1945, they had little earnings in the calendar year 1945. The result would have been the same, though not to such a great degree, if the defendant's plan to take a percentage of the earnings in the fiscal year 1946 had been adopted.

Plaintiff alleged that the agreement deprived veterans in the class, on whose behalf this suit is brought, of rights expressly granted to them under § 8(c) of the Act. Plaintiff, in particular, alleged that, at the time of the negotiations which resulted in the 1946 agreement, defendant knew and intended that the agreement would have the effect of depriving veterans of almost all vacation pay in the year in which they returned (i.e., calendar year 1945 and fiscal year 1946).

Defendant, in its answer, denied that the purpose or effect of the agreement was to discriminate against veterans with respect to vacation pay. Both plaintiff and defendant

moved for summary judgment. In support of its motion, defendant filed affidavits stating the negotiations between itself and the union and purporting to show that the plan eventually adopted was proposed by the union. It also showed by affidavit that there was no established practice as to vacation allowances, as this was a subject of annual negotiation and agreement. It alleged that, therefore, there was no discrimination within the meaning of the statute.

The court below denied plaintiff's motion for summary judgment and granted the cross-motion of the defendant. It held that, since there was no established practice as to vacation pay, a collective bargaining agreement changing the method of computing the amount as to all employees while the plaintiffs were away did not constitute discrimination as to them. By a summary judgment order, the complaint was dismissed. Plaintiff has appealed.

FRANK, Circuit Judge:

1. Vacation pay does not come within those provisions of 50 U.S.C. § 308(c), ensuring restoration of a veteran's rights without loss of seniority, but within the provision that a veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted" into the Armed Forces. See Siaskiewics v. General Electric Company, 166 F. (2d) 463, 465-466 (C.A. 2); Dwyer v. Crosley Company, 167 F. (2d) 567 (C.A. 2). Consequently, Oakley v. Louisville & N. R. Co., 338 U.S. 278, Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, and Diehl v. Lehigh Valley R. Co., 348 U.S. 960, are inapposite, since they dealt solely with the seniority provisions of § 308(c) and not at all with the "other benefits" provision of that clause. Since vacation pay was

subject to annual negotiation and agreement, the court below properly

(Original opinion)	(Revised opinion)
found that there were no "established rules and practices" relating to vacation allowances. Therefore, the express language of the "other benefits" clause in § 308(c) is not applicable.	denied the plaintiff's motion for summary judgment since he was not entitled, as a matter of law, to "other benefits" calculated under the 1940 agreement.

2. However, plaintiff also alleged that the collective-bargaining agreement adopted in 1946 unlawfully discriminated against returning veterans like himself. If the sole evidence of discrimination were the agreement itself, we would feel constrained by the precedents to affirm the summary judgment. But here plaintiff alleged that defendant intended, by means of the agreement, to discriminate against veterans for its own financial gain. Such an allegation of "bad faith" states a good cause of action under § 308(c), and plaintiff must therefore be given the opportunity at a trial to produce evidence, in addition to the agreement, in support of that allegation.

In Aeronautical Lodge v. Campbell, 337 U.S. 521, the Court significantly ended its opinion thus: "All this presupposes, obviously, that an agreement containing the 1945 provisions expresses honest desires for the protection of all members of the Union and is not a skillful device of hostility to veterans. There is not the remotest suggestion that the 1945 agreement was other than what it purported to be. * * *" In Ford Motor Company v. Huffman, 345 U.S. 330, 338, the Court said that, under NLRA, a collective-bargaining agreement is ordinarily not susceptible to attack, because of discrimination, but that this conclusion is "subject always to complete good faith and honesty of purpose. * * *" Cf. Steele v. L. & N. R. Co., 323 U.S. 192, 203-204. In Foster v. General Motors Corporation, 191 F. (2d) 907, 912 (C.A. 7), the court said: "There is no allegation in the complaint that the agreement between the defendant and the union was made in bad faith, and no

allegations of fact which, in our view, could form the basis for any legal discrimination." In Dougherty v. General Motors Corporation, 176 F. (2d) 561, 563 (C.A. 3), the court said that plaintiff "makes no allegation that such discrimination was intended, and in fact he affirmatively states that the situation of returning veterans 'apparently was not considered.'"

The complaint in the instant case is markedly different. It explicitly alleges that the adoption of the percentage-of-earnings clause for the single year "was a device of hostility directed at veterans and having a substantial adverse effect on them alone"; that the defendant "had the purpose" and "knew and intended" this result; and that defendant "intended such unlawful discrimination" for "its own benefit and gain and to the financial injury and loss of plaintiffs."

Defendant argues as follows: (1) The affidavit of Seaton, defendant's labor relations director, flatly contradicts the complaint's unsworn allegations to which we have referred, since it states facts which show that the agreement was in good faith and was not intended by defendant to discriminate against veterans such as plaintiff; (2) the plaintiff filed no answering affidavit; (3) therefore the summary judgment for defendant was proper. That argument disregards this important factor: The affidavit relates facts peculiarly within the knowledge of defendant's officials; indeed, it recites that Seaton is "familiar with and has personal knowledge" of the facts. In such circumstances (especially where, as here, such a matter as good faith, or the like, is crucial), the granting of a summary judgment is error. For the opponent of the motion is thereby deprived of the opportunity to cross-examine the movant's officials, and is prevented from having a trial court assisted in its evaluation of their credibility by observing

their demeanor while they testify. See, e.g., Colby v. Klune, 178 F. (2d) 872 (C.A. 2); Rosant v. Bank of New York, 156 F. (2d) 787, 790 (C.A. 2); Subin v. Goldsmith, 224 F. (2d) 753, 767 (C.A. 2), cert. den. ---- U.S. ---- (November 7, 1955); The Alabama Great Southern R. Co. v. Louisville & Nashville R. Co., 224 F. (2d) 1, 5 (C.A. 5). In Subin v. Goldsmith, supra, we explained why, in such a case, the failure of the opponent of the motion to file a

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2 Defendant's argument is peculiarly weak, for plaintiff had submitted interrogatories which defendant had not answered when the summary judgment was entered. Among the interrogatories were these:

"Who represented defendant, or participated on defendant's behalf, in the negotiations with the UAW-CIO which led to the agreement or contract with that union in 1946 governing the terms and conditions of employment of defendant's employees? Which of these participated in negotiation or discussion with the union of the vacation pay provision of that agreement? What are the office and home addresses of each?

"Who among defendant's officials or employees reviewed or approved proposals of defendant concerning the 1946 vacation pay provision? Who reviewed or approved the final provision on defendant's behalf before it was agreed to by defendant? What are the office and home addresses of each?

"Were any instructions, policies, directions, or advice concerning reemployment of veterans sent to division heads or plant managers? If so, on what dates were they sent, who originated and who approved them, who received and who was responsible for acting on them, and what are now (and were then) the titles or positions, and present office and home addresses of each person?

"Were any reports or statements of action taken, policies or programs adopted, numbers of employees affected, or other matters concerning reemployment of veterans prepared at plants or in divisions of defendant? Were any such reports or statements forwarded to higher levels of management of defendants? On what dates were such reports or statements prepared or forwarded, who originated and who approved them, who received and who was responsible for acting on them, and what are now (and were then) the titles or positions, and present office and home addresses of each person?

"What accounting, wage costs, costs of other outlays to employees, financial, or employment data were prepared for or submitted to officials or employees listed in question 18 in connection with 1946 bargaining negotiations with UAW? On what dates were such data prepared or submitted? Who originated and who approved them, who received them, and what are now (and were then) the titles or positions, and present office and home addresses of each person?"

counter-affidavit has no significance.[3] As we there recently discussed this point in detail, we shall not do so here. We note that in The Alabama Great Southern R. Company case, 224 F. (2d) 1, 5 (C.A. 5), the Fifth Circuit said: "In many recent cases, where motive, intent, subjective feelings and reactions, consciousness and conscience were to be searched, and examination and cross-examination were necessary instruments in obtaining the truth, we have pointed out that and why the issues may not be disposed of on summary judgment. Other courts have done the same. In Subin v. Goldsmith, 2 Cir., 224 F. (2d) 753, the majority opinion in a thoroughgoing exposition of why a summary judgment should, and should not, be granted in cases of this general nature, collects and cites the controlling authorities."

We think, therefore, that plaintiff is entitled to a trial on the issue of defendant's intention to discriminate against veterans. If the trial court should find the agreement discriminatory, it will have to consider

(Original opinion)	(Revised opinion)
the problem of damages, i.e., the treatment that will put veterans as a class on equal footing with non-veterans, for purposes of computing vacation pay.	the problem of damages. Our tentative impression is that the damages should be measured by the agreement of April 16, 1945, terminated December 10, 1945. But, as the matter was not argued before us, we think it best to leave the determination, at least in the first instance, to the trial judge, if the question should arise, after he has considered the evidence and arguments of counsel.

Reversed with directions to conduct a trial in accordance with this opinion.

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3 If and to the extent that Foster v. General Motors, 191 F. (2d) 907, 911-912 (C.A. 7), may perhaps be read as at odds with our conclusion on this point, we disagree with it.